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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROGER CHAN MATH, Defendant and Appellant.	B174476 (Los Angeles County Super. Ct. No. NA054331)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc J. Nolan and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Roger Chan Math appeals from a judgment entered upon his conviction in a court trial of three counts of continuing sexual abuse of a child under 14 years old (Pen. Code, § 288.5, subd. (a), counts 1-3),[1] and misdemeanor possession of child pornography (§ 311.11, subd. (a), count 4).[2] The trial court sentenced appellant to an aggregate state prison term of 12 years. Appellant's sole contention is that the trial court abused its discretion in denying his request for probation.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Trial Evidence

In August 2001, appellant began dating Sophia N. She had two young sons and a daughter, S., who was born in 1990. Shortly after they began dating, appellant's daughter, A., born in 1992, moved into Sophia's home and shared a room with S.. Appellant often spent nights at Sophia's home, but also maintained a separate residence. A. frequently went to appellant's house for weekends. R., Sophia's cousin who was born in 1989, stayed at Sophia's home every weekend and during school vacations. Sophia sometimes took R. to appellant's residence to spend the night with A..

From before the time appellant and Sophia began dating, when A. was seven or eight years old, until appellant's arrest in September 2002, appellant molested A. more than 50 times. He touched her vaginal area under her clothes. Appellant inserted his fingers into her vagina, touched the outside of her vagina "a lot" with his penis, without inserting it, and touched her "bottom," under her clothes. Once, he placed his tongue on her vagina. He also showed her pictures on his computer of naked people, including children, and a folder with pictures of naked children.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Appellant was acquitted of three counts of exhibiting harmful matter to a child (§ 288.2, subd. (a)).

Appellant began molesting S. when she was 11 or 12 years old. On more than 30 occasions, over the course of a year, he placed his hands on her breasts and squeezed them, sometimes over her clothes and sometimes inside her bra. Once, he touched her vaginal area over her clothing, and once he kissed her and placed his tongue insider her mouth. S. also saw photographs of naked little girls on appellant's computer.

Appellant began molesting R. when she was 12 or 13 years old. He would come up to her from behind and touch her breasts, buttocks and vaginal area over her clothing. He tried to reach inside her clothes to touch her breasts, but she moved away. Appellant touched R. more than 50 times, over a period of more than a year. On five different occasions, appellant showed R. photographs of naked girls and naked women on his computers. On five occasions, he also showed her movies of naked adults having sex.

Appellant warned each of the girls not to tell anyone about his touching them. The girls nonetheless shared these incidents with each other, but none told any adult. S. was "afraid [appellant] might do something," R. was told she would get in trouble if she told, and A. feared "something might happen."

In September 2002, the night before the Cambodian Memorial Day, Sophia and appellant argued about appellant watching child pornography on her computer. The next morning, R. told her mother, Y., that appellant had been touching S. and A.. Y. then told Sophia. The adults confronted all three girls who confirmed that appellant had been molesting them. The girls were taken to the hospital for examinations and were interviewed by police.

According to Sophia, appellant occasionally told her that it would turn him on if S. and A. watched them during sex. Pursuant to a search warrant, police obtained computers and other materials containing child and adult pornography from appellant's and Sophia's residence.

Several witnesses testified in appellant's defense. His 19-year-old son, Haryfin Math, testified that during a trip by appellant to Cambodia, someone told Sophia that appellant was cheating on her with a woman there. Sophia threatened to have appellant

killed in Cambodia or do whatever she could to make him go to jail on his return. Appellant's neighbor, San Sok, testified that he heard Sophia threatening to do anything to ensure appellant remained in prison. Haryfin, Sok and appellant's 17-year-old daughter, Marianne, saw Sophia physically attack appellant on different occasions. Another neighbor, Sochea Tath, believed Sophia was trying to get people to lie about appellant who had a very good reputation in the community. Marianne testified that the previous day in court, she and A. had gone to the bathroom together. A. told her that she had lied about appellant because Sophia told her to, and she would get into trouble if she disobeyed. A.'s 11-year-old friend, R.T., also testified that he heard A. say she was afraid of Sophia and could not tell the truth in court or she would be punished.

Sentencing hearing

Appellant was found guilty of three counts of sexual abuse of a child under 14 years old and one count of possessing child pornography. When the trial court sentenced appellant on March 5, 2004, it had before it the probation report, the section 288.1 report prepared by psychologist Hy Malinek, and the section 1203.03 report prepared by the Department of Corrections. Additionally, Mary Blatz, an employee at the Ministry of Community Development for the Archdiocese of Los Angeles, testified for the defense.

The probation report.

The probation report, completed November 27, 2002, recommended that probation be denied and appellant sentenced to state prison. It noted that while appellant had no prior record, appeared to be steadily employed and did not appear to be involved with alcohol or drugs, his behavior seriously altered the lives of three minors entrusted to his care, and that the long term injury "demands the punishment offered by state prison for both punishment and as a means of stopping defendant from selecting other victims." It enumerated as aggravating factors, (1) the vulnerability of the victims, (2) that there were multiple victims, and (3) the planning, sophistication and professionalism with which the crimes were carried out or other facts indicating premeditation. The only mitigating factor noted was that appellant had no prior criminal record.

The section 288.1 report.

Hy Malinek, a psychologist, prepared the section 288.1 report.[3] Malinek opined that "[t]he allegations in this case point quite strongly in the direction of a sexual Deviation, with a distinct interest in under-age females." Appellant's convictions suggested "non-exclusive pedophilia." Malinek continued: "[Appellant] presents as a passive-dependent individual, who is quite removed from his feelings and who apparently remains in denial of his sexually deviant conduct. He insists that he is not sexually attracted to children, and denies the allegations in this case altogether." Malinek nonetheless found the offenses in this case to have been "more opportunistic than predatory," because appellant did not target strangers, but relatives who were readily accessible. Consequently, Malinek concluded that the risk that appellant posed to the community at large in terms of sexual offenses was "probably low." Appellant had no prior criminal record for sexual misconduct and had none of the criminological factors associated with recidivism for sex offenders. However, Malinek found "[appellant's] denial of the charges . . . troubling," although admission of responsibility had not been associated with lower recidivism rates among sex offenders. Malinek strongly recommended that appellant participate in a sex offender treatment program, and be prohibited from any unsupervised contact with under age females. Malinek believed that appellant was eager to please and would likely attend required meetings.

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[3] Section 288.1 provides in part: "Any person convicted of committing any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable [mental health professional or program] as to the mental condition of that person."

The section 1203.03 report.

The section 1203.03 report[4] stated that it "was prepared with the objective of assessing [appellant's] potential for functioning successfully on probation or under other supervision, and the level of threat to the community if he should fail to live up to that potential." The report noted that there was a difference in the recommendation of the two Department of Correction (Department) evaluators assessing appellant, resulting in an Administrative review. The Department's recommendation was to commit appellant to the Department, as he was an unsuitable candidate for probation. He was "too high a risk for probation supervision." It noted that appellant minimized his culpability and did not appear to have genuine remorse.

One of the Department's evaluators, F.N. Spigner, a correctional counselor, opined that appellant was aware of the gravity of his offense. He did not accept responsibility for any of the crimes, and he showed no remorse and expressed no concern for the future of his victims. Appellant reported that his wife was "controlling, unfaithful, stingy with money, sexually cold and that he was left to do the woman's work while she cavorted around with other younger more powerful men." Spigner concluded that because of his manipulative behavior and anger at his wife, appellant was a threat to the community and to his family.

Another Department evaluator, Tseday Aberra, a psychologist, observed no symptoms of "a primary psychiatric illness, or developmental disability." Appellant told

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[4] Section 1203.03 provides in part: "(a) In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period."

Aberra that he never sexually abused his daughter, and that the pornographic material that was in the home was brought there by his former wife, and that they would occasionally view it together. He stated that the material was never shown to his daughter. "Based on limited information," Aberra concluded that, "the results of this evaluation did not indicate the presence of sexual deviancy." He added: "This finding, an absence of prior contact with the law, and his presentation during this evaluation suggested that, it might seem more appropriate to release [appellant] to the community under supervision." Aberra recommended probation, with appellant having contact with the victim only under supervision. The report failed to mention either of the other victims besides appellant's daughter, thereby failing to indicate whether, in reaching his conclusions, Aberra was even aware that appellant had other victims.

Mary Blatz testimony.

Mary Blatz testified at the sentencing hearing that appellant said he wanted to be a law abiding citizen and was willing to do community service.

Trial court sentence.

The trial court denied probation, stating: "I think these crimes are pretty heinous. I can't disagree with what the People have said. And it was more than one victim and that was another thing . . . [¶] . . . [¶] There was a slew of child pornography, disgusting child pornography and there may be some cultural problems one way or another but I don't know how that should in any way reflect on how the court's sentences should be. This behavior is wrong notwithstanding what culture it's engaged in, it's just wrong. Young people ought to have the right to be free from having this kind of thing happen to them by members of their family, members of their extended family, it's just inappropriate. [¶] I just don't have a great deal of sympathy for your client because of the acts." It sentenced appellant to the midterm of 12 years on the continuing sexual abuse count related to his abuse of A., 12 years concurrent terms on the continuing sexual abuse counts related to his abuse of S. and R., and a one year, concurrent term with regard to the misdemeanor, possession of child pornography charge.

DISCUSSION

Appellant contends that the trial court abused its discretion in denying his request for probation. He argues that the author of the section 288.1 report and one of the two individuals evaluating appellant for the section 1203.03 report opined that appellant would be an appropriate candidate for probation. Malinek stated that appellant lacked "all of the criminological risk factors . . . associated with recidivism among sex offenders," and Aberra found no indication of sexual deviancy in appellant. Appellant asserts that these reports establish that it would not have been an abuse of discretion for the trial court to have granted probation. This contention is utterly meritless.

We review an order denying probation for abuse of discretion and will not reverse such an order absent clear abuse. (*People v. Podesto* (1976) 62 Cal.App.3d 708, 723.) Substantial deference must be accorded to the trial court's exercise of its broad discretion regarding probation because probation is almost wholly within the trial court's sound discretion. (*People v. Walker* (1960) 181 Cal.App.2d 227, 230.) Consequently, in order to establish an abuse of discretion in denying probation, the defendant must shoulder a heavy burden. (*People v. Lippner* (1933) 219 Cal. 395, 400 [probation order requires very strong showing of abuse to reverse]; *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

As these authorities make clear, appellant misconstrues our task. Contrary to his assertion, our function is not to assess whether the trial court could have properly exercised its discretion to grant probation, but whether it did properly exercise that discretion in denying probation. We answer the latter question in the affirmative.

We begin by considering the heinous nature of appellant's crime. For a period in excess of a year, he subjected his daughter and two other young girls to repeated molestation, including digital penetration of the vagina of one of the girls and fondling the breasts of each of them. When apprehended, appellant expressed no remorse for his conduct and in fact repeatedly denied that he had even engaged in such conduct. The probation report recommended state prison, stating that punishment was a means of

"stopping defendant from selecting other victims." The section 1203.03 report similarly recommended state prison.

While Malinek's section 288.1 report and the portion of the section 1203.03 report submitted by Aberra appeared favorable to probation, those reports were not completely consistent with each other regarding appellant's psychopathology. Malinek concluded that appellant's conduct "point[s] quite strongly in the direction of a sexual Deviation," while Aberra concluded that, "the results of this evaluation did not indicate the presence of sexual deviancy." Malinek's conclusion that appellant was not predatory and did not have a high risk of recidivism, was undermined by his recommendation that appellant be prohibited from unsupervised contact with any under age females. Aberra's report made no reference to appellant's multiple victims, seemingly unaware that there were any victims besides A.. Given these inconsistencies and the unfavorable reports of probation and the Department, the trial court was not obliged to accept Malinek's or Aberra's opinions, but could, and did, reject them in favor of information before it that it found more compelling.

Appellant's reliance on *People v. Bruce G.* (2002) 97 Cal.App.4th 1233 is misplaced. In that case, the defendant was convicted of sexually molesting his daughters. The trial court denied him probation, relying upon section 1203.066, which precluded probation to anyone who has engaged in "substantial sexual conduct" with anyone under the age of 14 unless the trial court made certain findings. The information did not specifically plead "substantial sexual conduct," and the jury made no findings thereon, as required by the statute. The jury's findings that defendant violated section 288, subdivision (a), were not findings that defendant engaged in "substantial sexual conduct," since a violation of section 288, occurs whenever, to gratify the child's or the actor's sexual desires, an actor merely touches a child under the age of 14. Accordingly, section 1203.066 did not apply to limit the trial court's discretion in determining whether to grant defendant probation. The Court of Appeal concluded that the facts presented did not preclude the exercise of discretion to grant probation (*id*. at p. 1248) and therefore

remanded the matter to the trial court for resentencing under the correct standard (*id.* at pp. 1247-1248). The Court of Appeal did not conclude that the defendant should have received probation or that it would have been an abuse of discretion not to order probation. Thus, even if the facts of that case were similar to those presented here, the Court of Appeal expressed no opinion on the issue before us.

DISPOSITION

The judgment is affirmed.

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We concur:

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ASHMANN-GERST